

HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COLLIN A. SULLIVAN,

Plaintiff,

v.

LOWE'S HIW, INC. a Washington corporation,
and LOWE'S HOME CENTERS, LLC, a North
Carolina limited liability company,

Defendants.

No. 2:15-cv-01184-JLR

DEFENDANT LOWE'S HOME
CENTERS, LLC'S MOTION TO
DISMISS CERTAIN CLAIMS
UNDER FED. R. CIV. P. 12(b)(6)

NOTE ON MOTION CALENDAR:

AUGUST 28, 2015

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Collin Sullivan claims Defendant Lowe's Home Centers, LLC¹ ("Lowe's" or "Defendant") discriminated against him in violation of the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. § 2000ff-1(b) when it asked him to submit to a drug test administered by cheek swab after he reported an on-the-job injury. Plaintiff's GINA claim should be dismissed for two reasons.

First, Plaintiff has failed to exhaust his administrative remedies before bringing this claim. He never filed a genetic discrimination charge with the EEOC (or other state agency authorized to grant relief under the Act), nor does he allege doing so in his Complaint. Plaintiff's failure to comply with the statutory prerequisites for exhaustion is an absolute bar to his claim.

Second, Plaintiff's GINA claim is not cognizable in any event. Plaintiff admits Lowe's was attempting to administer a drug test, not a genetic test, and it is not unlawful to administer drug tests under GINA.

For these reasons, Defendant respectfully requests that the Court grant its motion and dismiss Plaintiff's GINA claim with prejudice.²

II. STATEMENT OF FACTS³

A. Defendant Lowe's Home Centers, LLC

Lowe's Home Centers, LLC is incorporated under the laws of North Carolina with its principal place of business and corporate headquarters located in Mooresville, North Carolina. Complaint, ¶ 1.3. Lowe's operates a retail store in Issaquah, Washington. *Id.*, ¶ 1.5

¹ Plaintiff names both Lowe's HIW, Inc. and Lowe's Home Centers, LLC. Lowe's HIW, Inc. is no longer an active corporation in Washington State. It merged with Lowe's Home Centers, LLC in 2014. Lowe's HIW, Inc. should not be named as party.

² Defendant does not seek dismissal of Plaintiff's other claims asserted in his lawsuit at this time.

³ For purposes of this motion and this motion only, Defendant presumes the facts as alleged in the Complaint are true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009) (noting that for purposes of a motion to dismiss, court's take factual allegations in the complaint as true). By filing this motion, Defendant does not waive its right to later challenge these factual assertions, nor does it waive any other defenses or counter claims.

B. Plaintiff

Plaintiff is a resident of Issaquah, Washington. *Id.*, ¶ 1.1. Lowe's employed Plaintiff at its Issaquah location from 2001 until July 2012, when Lowe's terminated him. *Id.*, ¶¶ 2.2, 2.16. In early June, Plaintiff suffered an injury that he later alleged was work-related. *Id.*, ¶¶ 2.3-2.4. Plaintiff filed a workers' compensation claim, and as part of that process, he met with a representative of Lowe's HR department in July 2012. *Id.* Consistent with Lowe's practice for workplace accidents, Lowe's asked Plaintiff to submit to a drug test taken in the form of a cheek swab. *Id.*, ¶ 2.11. Plaintiff refused, and Lowe's terminated his employment shortly thereafter. *Id.*, ¶ 2.11-2.16.

C. Plaintiff's Allegations

Plaintiff alleges five employment-related claims under Washington state law. He alleges one common-law right of action for wrongful discharge in violation of public policy, (*id.*, ¶¶ 3.2-3.5) and four statutory claims under the Washington Law Against Discrimination (Chapter 49.60 RCW), including age discrimination and disability discrimination (*id.*, ¶¶ 3.6-3.11), failure to accommodate his disability (*id.*, ¶¶ 3.16-3.18), and retaliation (*id.*, ¶ 3.12-3.13). He also alleges that Lowe's violated the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. § 2000ff-1(b), by terminating his employment after he refused to submit to a drug test (*id.*, ¶ 3.19-3.23).

Plaintiff filed his Complaint in state court. Defendant removed to this Court on July 27, 2015, based on complete diversity jurisdiction and, alternatively, federal question jurisdiction. Dkt. No. 1 (Def.'s Notice of Removal).

III. ARGUMENT AND AUTHORITY

Plaintiff's GINA claim should be dismissed under Fed. Rule of Civ. P. 12(b)(6) for two independently sufficient reasons. Plaintiff did not plead any facts showing that he exhausted his administrative remedies under the Act before proceeding against Lowe's in civil court. Separately, Plaintiff's claim, as pled, is not cognizable under GINA because a run-of-the-mill drug test is not a "genetic test" under the Act or its implementing regulations.

1 **A. Legal Standard**

2 The Federal Rules of Civil Procedure permit dismissal for “failure to state a claim upon
3 which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The Court should grant a defendant’s
4 Rule 12(b)(6) motion if the allegations in a complaint would not entitle the plaintiff to any
5 relief, either because they lack “a cognizable legal theory” or do not contain “sufficient facts
6 alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
7 (9th Cir. 1988); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, (1957); *see also*
8 *McGowan v. Washington State Dep’t of Labor and Industries*, No. CV-05-5009-EFS, 2005 WL
9 1421111 at *2 (E.D. Wash., June 16, 2005) (“A claim should be dismissed where there is a
10 ‘lack of cognizable legal theory’ or ‘absence of sufficient facts alleged under a cognizable legal
11 theory.’”). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
12 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
13 of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955
14 (2007). A plaintiff must allege enough facts to state a claim for relief that is plausible on its
15 face. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009); *Twombly*, 550 U.S. at 570.

16 Although the Court must accept well-pleaded facts, conclusory legal allegations and
17 unwarranted inferences cannot defeat a motion to dismiss. *See Vasquez v. L.A. Cnty.*, 487 F.3d
18 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
19 2001). “[T]he Federal Rules do not require courts to credit a complaint’s conclusory
20 statements without reference to its factual context.” *Iqbal*, 556 U.S. at 686. “A complaint will
21 not survive a motion to dismiss if it ‘tenders naked assertions devoid of further factual
22 enhancement.’” *Blantz v. California Dept. of Corr.*, 727 F.3d 917, 927 (9th Cir. 2013) (quoting
23 *Iqbal*, 556 U.S. at 678). “It is not . . . proper for the court to assume that [the plaintiff] can
24 prove facts that it has not alleged or that defendants have violated . . . laws in ways that have
25 not been alleged.” *Twombly*, 550 U.S. at 588 n.8 (quoting *Associated Gen. Contractors of Cal.,*
26 *Inc. v. Carpenters*, 459 U.S. 519, 540, 103 S. Ct. 897 (1983)).

1 When the allegations fail to state a claim, as they do here, “this basic deficiency should .
 2 . . be exposed at the minimum expenditure of time and money by the parties and the court.”
 3 *Twombly*, 550 U.S. at 558 (citation omitted). If the allegations do not “state a claim to relief
 4 that is plausible on its face,” the court must dismiss the claim. *Id.* at 570.

5 **B. Plaintiff Failed to Exhaust His Administrative Remedies**

6 GINA prohibits discrimination against employees on the basis of genetic information.
 7 Among its prohibitions, the Act makes it unlawful for an employer to “discharge . . . any
 8 employee . . . because of genetic information with respect to the employee,” 42 U.S.C. §
 9 2000ff-1(a)(1), or “request, require, or purchase genetic information with respect to an
 10 employee” unless an exemption applies. 42 U.S.C. § 2000ff-1(b).

11 To pursue a GINA claim in court, a plaintiff must file a timely and sufficient charge
 12 with the EEOC (or authorized state agency) and obtain a right to sue letter before filing suit in a
 13 civil court. *See* 42 U.S.C.2000ff-6(a)(1) (incorporating 42 U.S.C. § 2000e-5(e)(1)); *see also* 29
 14 C.F.R. § 1635.10 (incorporating administrative remedy requirements from Title VII); *Lebrón-*
 15 *Ríos v. United States Marshal Serv.*, 341 F.3d 7, 12 (1st Cir. 2003) (dismissing a Title VII suit
 16 filed without exhausting administrative remedies). This “exhaustion” requirement “reflects a
 17 congressional intent to use administrative conciliation as the primary means of handling claims,
 18 thereby encouraging quicker, less formal, and less expensive resolution of disputes.” *Balas v.*
 19 *Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 407 (4th Cir. 2013) (quoting *Chris v. Tenet*, 221
 20 F.3d 648, 653 (4th Cir. 2000)). Courts uniformly hold that a failure to file an EEOC charge is a
 21 complete bar, precluding plaintiff’s claim. *See, e.g., Echols v. Living Classrooms Found., Inc.*,
 22 WDQ–13–03156, 2014 WL 6835559, at *7 (D. Md., Dec. 2, 2014) (applying Title VII’s
 23 exhaustion requirements to GINA claim and dismissing GINA claim for failing to file a
 24 sufficient EEOC charge); *Flint v. Action Personnel, Inc.*, 2013 WL 6729528, *2 (W.D. Vir.,
 25 Dec. 19, 2013) (dismissing plaintiff’s GINA for failing to plead sufficient to show she
 26 exhausted administrative remedies).

Here, Plaintiff alleges (1) that he suffered a workplace injury and filed a workers' compensation claim in June 2012; (2) that Lowe's demanded he "take a drug test in the form of a cheek swab" in July 2012; (3) that this request to submit to a drug test violated his rights under GINA; (4) and that he filed a complaint with the "Department of Labor and Industries" in August or September 2012, alleging retaliation for filing a workers' compensation claim. Complaint, ¶¶ 2.3-2.4, 2.10- 2.13, 2.18, 3.19-3.23.

These facts, even if true, are facially inadequate to support a GINA claim. Plaintiff does not allege that he filed a charge with the EEOC or that he obtained a right to sue letter, which are statutory prerequisites to a civil lawsuit.⁴ Plaintiff plainly failed to exhaust the administrative process and failed to plead facts sufficient to his claim. His claim should be dismissed for this reason alone. *See, e.g., Echols*, 2014 WL 6835559, at *7.

C. Plaintiff's Claim Is Not Cognizable Under GINA

Even if Plaintiff exhausted his administrative remedies (he did not), and pleaded facts sufficient to support that inference in his Complaint (he did not), his claim should still be dismissed. Plaintiff's claim is not cognizable under GINA because post-accident drug tests are expressly permitted under Act.

GINA makes it unlawful for an employer to "request . . . genetic information with respect to an employee" unless one of six enumerated exemptions applies (none of which appear relevant here). 42 U.S.C. § 2000ff-1(b). "Genetic Information" means information as "with respect to any individual, information about (i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual." 42 U.S.C. § 2000ff(4)(A). Because Plaintiff does not allege that Lowe's administered a genetic test to a family member or sought information about a family member's disease or disorder, only Part (i) applies. As a result,

⁴ Plaintiff's assertion that he filed a claim with the Washington Department of Labor and Industries (L&I) does not cure this defect because L&I has no jurisdiction over allegations of GINA violations. Even if it has proper jurisdiction, which it does not, Plaintiff's claim does not allege any discrimination based on GINA in his L&I complaint.

1 “genetic information” means information about an employee’s “genetic tests” for purposes of
2 this case.

3 “Genetic tests” is also defined by statute. It means “an analysis of human DNA, RNA,
4 chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal
5 changes.” 42 U.S.C. § 2000ff(7)(A). Absent is any mention whatsoever of drugs and drug
6 tests. When a statute is unambiguous, as it is here, courts enforce it as written and will not
7 impute terms that Congress did not provide. *Nijjar v. Holder*, 689 F.3d 1077, 1084-85 (9th Cir.
8 2012). GINA thus does not prohibit tests for and information about the presence or absence of
9 drugs in one’s system. Requesting a run-of-the-mill drug test does not fall with the ambit of
10 prohibited activity under the Act.

11 Implementing regulations codify this interpretation. Not only do the regulations adopt
12 substantially similar definitions of “genetic information” and “genetic test,” *compare* 29 C.F.R.
13 1635.3 *with* 42 U.S.C. §§ 2000ff(4)(A) and (7)(A), but they go even further, expressly
14 excluding drug tests from the definition of “genetic test.” The regulations state, “***A test for the***
15 ***presence of alcohol or illegal drugs is not a genetic test.***” 29 CFR 1635.3(f)(4)(i).⁵ And as
16 intimated above, Plaintiff admits that Lowe’s was attempting to administer a “drug test” and
17 not a genetic test. Complaint, ¶ 2.10. Plaintiff, therefore, failed to plead a cognizable legal
18 theory. Because this defect cannot be cured by an amended complaint, the claim should be
19 dismissed with prejudice. *See, e.g., Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.) amended,
20 856 F.2d 111 (9th Cir. 1988) (leave to amend should be denied if amendment would be futile);
21 *Dejeu v. Dept. of Labor & Indus.*, No. C13-5401 RBL, 2013 WL 5437649, at * 3 (W.D. Wash.,
22 Sept. 27, 2013) (dismissing claims with prejudice under 12(b)(6)).

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26 ⁵ The regulations clarify that a test “to determine whether an individual has a genetic predisposition for alcoholism
27 or drug use,” is, however, a genetic test. 29 CFR 1635.3(f)(4)(ii). But this provision does not apply. Plaintiff
admits that Lowe’s attempted to administer a “drug test,” not a genetic-predisposition-to-drug-use test, and
Plaintiff does not allege otherwise. *See* Complaint, ¶¶ 2.11-2.16, 3.19-3.23.

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IV. CONCLUSION

For all of the foregoing reasons, Defendant respectfully requests that the Court grant its motion and dismiss Plaintiff's GINA claim.

DATED this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby declare that on August 3rd, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following::

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